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Reviving Lenity and Honest Belief at the Boundaries of Criminal Law

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REVIVING LENITY AND HONEST BELIEF AT THE BOUNDARIES OF CRIMINAL LAW

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It is a common misconception that there is a line between criminal and innocent conduct that is transparent and fixed. In fact, much of criminal law is fluid and elastic, free, if strategically applied, to label conduct as legal or illegal. In some cases, this reflects crimes that are vaguely defined or imprecise. In other cases, the prohibited conduct simply includes what is so conventionally accepted as legal that the criminal label is perceived as inapplicable until a prosecutor chooses to apply it. The problem of a fluid rather than a fixed line for criminality is that prosecutorial discretion becomes central to the application of the state's imposition of criminal sanctions. This Article illustrates, by core examples, how elastic the application of the criminal law can be. It considers remedies that will protect against both good and bad faith abuse without sacrificing the legitimate and central role of prosecutorial discretion. In particular the Article argues for a reinvigoration of the rule of lenity and for the incorporation of the English requirement of dishonesty in theft crimes.

INTRODUCTION

It is a common misconception that there is a line between criminal and innocent conduct that is transparent and fixed.[1] In part, much of criminal law is fluid and elastic, free, if strategically applied, to label conduct as legal or illegal. In some cases, this reflects crimes that are vaguely defined or imprecise. In other cases, the prohibited conduct simply includes what is so conventionally accepted as legal that the criminal label is perceived as inapplicable until a prosecutor chooses to apply it.

The problem of a fluid rather than fixed line for criminality is that prosecutorial discretion becomes central to the application of the state's imposition of criminal sanctions. The recent congressional investigations concerning the potential politicization of

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1. *See generally* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 417 (1958) (arguing that criminal law serves several complex and interwoven social purposes).

United States Attorney's offices put the problem in a darker light.[2] If criminal prosecution is politically motivated and existing statutory crime can be molded to cover behavior that is not clearly treated or perceived as criminal, the freedom of the political process itself can be placed in jeopardy. Indeed, "[a]s much as our society expects prosecutors to be unaffected by politics in their efforts to seek justice, it is impossible to ignore the fact that they occupy their positions because the political system put them there."[3] This problem is aggravated by a cottage industry of political consultants whose effects on behalf of their candidate can be strongly enhanced by catching the opposing candidate committing some criminal wrongdoing.

While prosecutorial bad faith, where defendants are targeted for political reasons, can easily be condemned if proven, the problem is even more endemic to the criminal justice system. Even good faith prosecutions can be inappropriately aggressive in applying criminal law to conduct generally not criminalized where other factors motivate zealousness. Indeed, this later assertion, unlike the politicization of the prosecutorial process, can itself be challenged. How can it be overzealous to catch the true bad guy and to be creative and aggressive in one's efforts? Some would argue that it is here where good balanced prosecutorial discretion can and even should stretch the criminal law to punish and deter criminality that would otherwise evade appropriate sanctions.

This Article proceeds as follows. In Part I, I will illustrate, by core examples, how elastic the application of the criminal law can be. In this Part, I will also explore how this elasticity can be inappropriately applied and demonstrate problems with this elasticity, namely, that crimes become vaguely defined by unclear private policies and that the criminal label can potentially be applied in a politically biased manner. In Part II, I will consider remedies that will prevent both good and bad faith abuse without sacrificing the legitimate and central role of prosecutorial discretion. In particular, I will argue for a reinvigoration of the rule of lenity as a statutory interpretation canon and for incorporation of the English requirement of dishonesty in theft crimes. As I will argue later, the American system of justice—and indeed its political freedoms—depends on ensuring protection from the misuse of the criminal sanction.

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2. *See generally* Eric Lichtblau, *Report Sees Illegal Hiring Practices at Justice Dept.*, N.Y. TIMES, June 25, 2008, http://www.nytimes.com/2008/06/25/washington/24cnd-justice.html (reporting on the increasingly political hiring practices at the Justice Department).

3. Sandra Caron George, *Prosecutorial Discretion: What's Politics Got to Do with It?*, 18 GEO. J. LEGAL ETHICS 739, 751 (2005).

I. AMBIGUOUS CRIMINALITY

This Part illustrates the ambiguity inherent in many crimes. It is not an exhaustive survey of criminal law, but it focuses on certain crimes that can be particularly susceptible to worrisome expansion: embezzlement, false pretense, extortion, political extortion, bribery, and obstruction of justice. Prosecutions for these crimes can sometimes offer little in the way of notice to the accused because they are based on vague definitions of acceptable private conduct, encompass conduct commonly viewed as legitimate, and pose a grave danger of being politically motivated.

A. The Ambiguity of Theft

Much public corruption and criminal prosecution for non-violent crimes focuses on theft, the criminal acquisition of property. At their origin, theft crimes were very limited, focusing on violent (robbery) and non-violent (larceny) taking of property of another with intent to deprive permanently. Other equivalent theft crimes have since then brought more elasticity into the definition of criminal theft.[4] This ambiguity is particularly poignant since wealth acquisition from others is praiseworthy in capitalism, creating pillars of industry and society.[5] On the other side of the line are the criminal thieves and worse.

1. Embezzlement: Vaguely, Privately Defined Crimes

Embezzlement, the fraudulent appropriation of property by one who has been entrusted with it,[6] poses significant borderline issues between the criminal and the non-criminal. The property of another has already been entrusted to the possession of the potential wrongdoer.[7] For embezzlement, the possessor must misappropriate the property.[8] This simply requires proof that the

4. George P. Fletcher, *The Metamorphosis of Larceny*, 89 HARV. L. REV. 469, 474 (1976).

5. *See, e.g.*, STEPHEN A. SALTZBURG ET AL., CRIMINAL LAW: CASES AND MATERIALS 479 (2008) ("The borderline between clever commercial skills worthy of praise in a capitalist society and 'criminal' acquisition is one that any society must carefully consider and define.")

6. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 729 (2d ed. 1986); ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 354 (3d ed. 1982); *see, e.g.*, CAL. PENAL CODE § 503 (West 2010).

7. *See* WAYNE LAFAVE, CRIMINAL LAW 952 (4th ed. 2003).

8. *See id.*

authorized possessor has utilized the property for a purpose or period in time unauthorized by the owner.[9] In many cases, the criminality is obvious, as, for example, when funds entrusted to someone are misused for personal purposes.[10]

Nevertheless, embezzlement is fraught with ambiguity and elasticity. Many jurisdictions (but not all) require intent to deprive permanently and exclude borrowing from criminal embezzlement.[11] Consequently, courts and prosecutors in those jurisdictions must carefully focus on intent. With respect to authorization, what constitutes authorized use is measured by non-legislative owner directive. In the context of employees and corporations, the difference between legitimate and criminal use can be quite subtle, as "[i]t is generally more difficult to decide whether misappropriation occurred than to decide whether property was unlawfully taken."[12] When does personal use of a fax machine, paper, telephone, or computer constitute criminal embezzlement? While technically no amount is *de minimis* under the law, at what amount does the corporation cease by its written and unwritten rules to have authorized or otherwise accepted such personal employee use? When should the prosecutor declare embezzlement?

These issues are hardly theoretical for modern public officials. A recent highly publicized case against a county coroner, marred by numerous outside allegations of improper political motivation against the United States Attorney, involved limited personal use of faxes and autopsy space.[13] In another case, the Los Angeles Sheriff was convicted of embezzlement in part for excessively providing transportation to a local politician.[14] A former director of the F.B.I. was fired for, among other things, using F.B.I. vehicles for personal

9. *Id.* at 947.

10. *Id.* at 948 ("Embezzlement statutes sometimes are worded in terms of the wrongdoer's conversion 'to his own use.'"); Louis Schwartz, *Theft*, *in* 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1537, 1543 (Sanford H. Kadish ed., 1983).

11. *See, e.g.*, People v. Talbot, 28 P.2d 1057 (Cal. 1934).

12. Schwartz, *supra* note 10, at 1544.

13. *See* Jason Cato, *Ex-Coroner Wecht Not a Criminal, Jurors Say*, PITTSBURGH TRIB.-REV., Apr. 29, 2008, http://www.pittsburghlive.com/x/pittsburghtrib/s_564787.html; Jason Cato, *Remaining Counts Against Ex-Coroner Wecht Are Dropped*, PITTSBURGH TRIB.-REV., June 2, 2009, http://www2.pittsburghlive.com/x/pittsburghtrib/news/specialreports/wecht/trial/s_627811.html; *see also* Paul Kiel, *Allegedly Political Prosecution Ends in Hung Jury*, TPMMUCKRAKER (Apr. 9, 2008, 2:49 PM), http://tpmmuckraker.talkingpointsmemo.com/2008/04/alleged_political_prosecution.php.

14. People v. Sperl, 126 Cal. Rptr. 907, 912–13 (Ct. App. 1976)

travel.[15] He argued that he had not acted improperly and that the "investigation into his activities was politically motivated."[16]

Embezzlement charges are not unique to public officials.[17] At high corporate levels, there can be a fine line between accepted corporate activities and unlawful conduct. For example, in successful prosecutions against the CEO and the general counsel of Tyco Corporation, the use of a mortgage loan program to purchase a resort residence and the sponsoring of a birthday celebration were found to be embezzlement.[18]

This is not to suggest that these or other cases were necessarily without criminal intent or effect. Nevertheless, these examples illustrate how the somewhat vague consensual conditions of possession can make the line between crime and private disagreements over proper policy toward property disturbingly elusive.

This line can be even more elusive in periods of economic stress where activities that might otherwise be viewed as benign and even well-deserved fringe benefits in times of corporate prosperity can quickly morph into accusations of criminal embezzlement. For example, in *People v. Talbot*,[19] a depression era embezzlement case, a defendant chief executive officer was found guilty of embezzlement for what he characterized as open advances against future salary that he argued were "his custom, [and the custom] in other companies of which he had been an executive."[20] The California Supreme Court, adopting the opinion of the California District Court of Appeal, noted that "[t]he evidence also shows that [all but one of] such withdrawals were not authorized by the board of directors," but held that "[e]ven if all of the directors of the corporation knew of such custom, the wrong was not made right," since company funds should be used only "for company needs."[21] The court further suggested that such ratification could potentially criminally implicate the entire corporate board.[22] Yet, as the court

15. *See* David Johnston, *Defiant F.B.I. Chief Removed from Job by the President*, N.Y. TIMES, July 20, 1993, at A1. One of the allegations against the F.B.I. director was that he used $10,000 of government money to build a fence at his home. *Id.* at A15.

16. SALTZBURG ET AL., *supra* note 5, at 544 (citing Johnston, *supra* note 15).

17. Indeed, "the typical embezzler [is] a 26-year old, married Caucasian female having a high school education, earning less than $10,000 annually and working in an entry level position for less than one year." Mark Pogrebin et al., *Stealing Money: An Assessment of Bank Embezzlers*, 4 BEHAV. SCI. & L. 481, 488–89 (1986).

18. *See* Andrew Ross Sorkin, *Ex-Chief and Aide Guilty of Looting Millions at Tyco*, N.Y. TIMES, June 18, 2005, at A1.

19. People v. Talbot, 28 P.2d 1057 (Cal. 1934).

20. *Id.* at 1061.

21. *Id.* at 1062.

22. *Id.*

conceded, elsewhere corporate advances against future salary were not necessarily unusual services provided to employees.[23]

Talbot illustrates not only the enormous potential ambiguity that may exist over the conditions for use of corporate funds and assets, but it also raises questions about who may set those conditions, and under what restraints. Lurking within cases like *Talbot* is the danger of equating what may arguably be at worst poor business judgment (at least in hindsight) with criminal theft. The contemporary recession, if not a depression, has still prompted enormous criticism of and investigation into extravagant corporate spending and bonuses.[24] This frenzy of public passion to retaliate can place enormous pressure on prosecutors to aggressively exploit the ordinary inherent ambiguity of embezzlement to police corporate excesses.[25] Rather than looking to statutory language, prosecutors, courts, and judges must instead extrapolate the conditions attached to the use of corporate property and funds from often conflicting and vague corporate practices and whatever written directives exist.[26] This is particularly difficult when the accused are responsible for defining these conditions and the legitimacy of even well-established corporate policy is questioned.[27]

The danger inherent in this ambiguity is that political populism will prompt prosecutors retroactively to look for criminal wrongdoing to help explain economic failures by excessively exploiting the extraordinarily vague and privately defined boundaries of

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23. *Id.* at 1058–59 ("[T]he practice of making advances of this sort to corporate officers and employees during this period was common .... The prevalence of this unlawful practice cannot, of course, justify it.").

24. *See* Michael A. Fletcher & Zachary A. Goldfarb, *Top Aides to Obama Upbraid Wall St.*, WASH. POST, Oct. 19, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/10/18/AR2009101802542.html; *see also Ex-Chief of Park Ave. Bank Charged with Bailout Fraud*, N.Y. TIMES DEALBOOK (March 15, 2010, 4:43PM), http://dealbook.blogs.nytimes.com/2010/03/15/ex-bank-president-accused-of-tarp-fraud/?scp=1&sq=fraud&st=cse.

25. Political frenzy places increased pressure on the prosecutor. *See* Robert H. Jackson, U.S. Att'y Gen., The Federal Prosecutor, Address at the Second Annual Conference of U.S. Attorneys (Apr. 1, 1940), http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/the-federal-prosecutor/.

26. *See* Schwartz, *supra* note 10, at 1544 ("That way of handling the transaction may violate standards of professional behavior which explicitly require clients' funds to be deposited and held in separate accounts; but it would be a harsh rule that transformed every violation of prophylactic professional regulations into a severely punishable theft. Ethical codes of the professions generally provide lesser sanctions, such as reprimand or suspension from practice, and no ethics committee of a professional association should have the power to redefine crime by changing its rules of ethics. On the other hand, the mere fact that an act violates professional standards should not immunize professional misbehavior from criminal sanctions that apply to identical conduct engaged in by nonprofessionals.").

27. *See, e.g.*, *Talbot*, 28 P.2d at 1058–59.

embezzlement. The elasticity inherent in the crime of embezzlement lends itself to this very problem.

2. False Pretense: Policing the Boundaries of Clever Salesmanship

False pretense is another theft crime whose definition encompasses ordinarily acceptable commercial conduct. Most jurisdictions define the crime as a misrepresentation by the defendant of a present or past material fact, with the intent to defraud the victim, which results in the victim relying on the misrepresentation when transferring title to property.[28] Unlike embezzlement and larceny, false pretense addresses deception leading to the transfer of title.[29] Historically, under the common law, a "buyer beware" doctrine essentially permitted misrepresentation as an acceptable business practice.[30] This has changed, but great debate still exists over the extension of false pretense to include "present intent" where the defendant can be criminally liable if he lies about his future plans.[31]

Traditionally, courts required that the misrepresentation in false pretense involve a past or present fact, excluding promises from criminal liability.[32] With the support of the Model Penal Code,[33] the majority of courts now characterize the misrepresentation of a present intention as a present fact, allowing false promises to be prosecuted under false pretense.[34] This may be viewed as a positive change, as the previous exclusion of false promises in commercial exchanges certainly left unpunished flagrantly false promises that cheated victims out of their money in exchange for assets and services the perpetrator never intended to provide. Nevertheless, the

28. LAFAVE, *supra* note 7, at 957.

29. *Id.*

30. *See* PERKINS & BOYCE, *supra* note 6, at 289.

31. Consider how in *Chaplin v. United States*, 157 F.2d 697, 698–99 (D.C. Cir. 1946), the court rejects the modern trend extension to include present intent while noting how problematic it may be to criminalize misrepresentations of present intent:

> It is of course true that then, as now, the intention to commit certain crimes was ascertained by looking backward from the act and finding that the accused intended to do what he did do. However, where, as here, the act complained of—namely, failure to repay money or use it as specified at the time of borrowing—is as consonant with ordinary commercial default as with criminal conduct, the danger of applying this technique to prove the crime is quite apparent.

32. *See id.* at 698.

33. *See* LAFAVE, *supra* note 7, at 960 (discussing MODEL PENAL CODE § 223.3(1)).

34. *See, e.g., id.* at 960–61.

expansion has imbedded enormous discretion with the prosecutor and blurred the boundary between acceptable and criminal conduct. The common law originally resisted criminalizing false promises, reflecting concern over the difficulty in distinguishing a simple failure to perform or breach of contract from those who despite their representations had no intention at the start to fulfill their promises.[35] A major concern was "[t]he risk of prosecuting one who is guilty of nothing more than a failure or inability to pay his debts" and the corresponding monetary and stigmatic cost of defending a suit.[36] The contemporary majority approach reflects confidence that the fact finder can distinguish between a fraudulent promise, which should be criminalized, and the merely innocent failure to keep a sincere promise.[37]

Interestingly, however, a more subtle and significant issue remains beyond simply proving the defendant's initial intent. As the Model Penal Code acknowledges, not all intentional misrepresentations should be viewed as criminal because "[a]mong businessmen, especially in certain trades, there will be a general understanding that words of promise mean only that the promisor will perform or submit to civil remedies."[38] Accordingly, in order to accommodate this significant commercial reality, "the promisor could be convicted of theft only if he clearly intends to do neither, as in the case where he accepts the benefits of the promise and then flees the country in order to avoid performance or damages on his part."[39] The Model Penal Code provides that

> the actor is to be understood in the sense in which he expected and desired his hearer to understand him and in the context of general understanding that surround the particular dealings involved. It is only where the actor did not believe what he purposely caused his victim to believe, and where this

35. *See Chaplin*, 157 F.2d at 699 ("Business affairs would be materially incumbered by the ever present threat that a debtor might be subjected to criminal penalties if the prosecutor and jury were of the view that at the time of borrowing he was mentally a cheat.").

36. *See id.*

37. *See, e.g.*, LAFAVE, *supra* note 7, at 960 n.27 ("Model Penal Code § 223.3(1) provides that one who purposely creates a false impression as to intention deceives so as to be eligible for theft by deception if he thereby obtains another's property; but goes on to caution that *a mere failure to perform a promise shall not give rise to an inference that the promisor never intended to perform his promise*. . . . Courts not infrequently emphasize . . . the proof of the present intention not to keep the promise must be very strong so as to ensure against convicting for a mere breach of contract." (emphasis added)).

38. MODEL PENAL CODE § 223.3 cmt. at 190 (1980).

39. *Id.*

> can be proved beyond a reasonable doubt, that the actor can be convicted of theft.[40]

Consequently, as the Model Penal Code describes false pretense, the line between exclusively civil and criminal remedies is defined by commercial context and mutual implicit understandings.[41] While embezzlement may be defined by specific private understandings concerning the proper and improper use of property entrusted to non-owners (itself, potentially vague, as discussed above), false pretense differentiates criminal versus legitimate false promises by a vague understanding of commercially acceptable conduct. The temptation to pursue criminal sanctions, however, undoubtedly increases when the alternative civil remedies the Model Penal Code notes are ineffective due to bankruptcy and other economic distress. As a result, the prosecutor has enormous discretion to characterize a simple breach of contract as a fraudulent crime, despite the fact that businesspeople may rationally decide in advance to breach when it is more efficient.[42] In a populist frenzy of a depressed economy, intentional misrepresentations that were once accepted as business norms[43] can easily be labeled as felonious. There simply, by definition, is no clear line.

Courts following the modern trend toward criminalizing a misrepresentation of state of mind sometimes find that a misrepresentation of a present state of mind,[44] or of a present ability to accomplish a future goal,[45] is tantamount to a misrepresentation of an existing fact. While these cases sometimes reach what appear to be just results,[46] left unchecked, such a broad

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40. *Id.* For further discussion of the theory of efficient breach of contract, where a promisor breaches because the cost of paying damages is less than the cost of compliance, see generally Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947 (1982).

41. *See* MODEL PENAL CODE § 223.3 cmt. at 189–90.

42. *Id.*; Macneil, *supra* note 40.

43. *See* PERKINS & BOYCE, *supra* note 6, at 289.

44. *See, e.g.*, People v. Ashley, 267 P.2d 271 (Cal. 1954). In *Ashley*, the defendant convinced two older women to transfer their life savings to him based on his representation that he intended to construct a theater. Instead, he spent the money on himself. The court held the defendant's intent not to invest the funds as he represented to the victims at the time he induced the transfer of funds, constituted a present fact and therefore could support a conviction for false pretense.

45. *See, e.g.*, State v. Love, 271 S.E.2d 110 (S.C. 1980). In *Love*, a magistrate accepted $5500 in exchange for "services" such as taking care of a person's DUI. The magistrate was not in a position to accomplish this, and the court held that his misrepresentation as to his ability to execute a future act constituted false pretenses.

46. The clearly wrongful conduct described in *Ashley* and *Love* is not the type of borderline conduct that concerns this Article, but these cases nonetheless apply a rule that

reading of the rules governing false pretenses risk criminalizing entirely legitimate commercial conduct (breaching an unprofitable contract and paying damages), and may ask too much of industries in which puffing is to be expected. What differentiates dishonesty in fact from shrewd salesmanship in borderline cases?

As discussed above regarding embezzlement, what does and does not constitute an illegitimate allocation of property depends on the commercial and professional context of the parties. A similar rule governs false pretenses: the varying expectations of information transparency in a particular commercial transaction seem to patrol the line of criminality. However, those expectations remain dangerously vague.

Moreover, the expectations of the parties in many transactions are continuously subject to reinterpretation by the parties themselves and by the courts. As it stands, the rule that an individual is guilty of false pretenses if the wronged party materially relied on a false statement given by the promisor, even if the wronged party might have suspected (but not discovered) its falsity, still encompasses most cases.[47] This rule encourages asymmetry in the market, as it reduces the incentive of less sophisticated parties to ascertain the truth, instead relying on the more sophisticated party to the deal to tell them the facts. Indeed, the Eleventh Circuit recently overruled *United States v. Brown*, a case that had held that a scheme to defraud under the federal mail fraud statute required that a person of ordinary prudence would have been deceived by the fraud.[48] In *Brown*, real estate investors were convicted of fraud and conspiracy because they did not tell out-of-state investors that their houses were more expensive than other houses.[49] The Eleventh Circuit reversed the convictions in *Brown*, ruling that the developers had no duty to disclose price disparities because "[a] 'scheme to defraud' under the pertinent criminal statutes has not been proved where a reasonable juror would have to conclude that the representation is about something which the customer should, and could, easily confirm—if they wished to do so—from readily availa-

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endangers people conducting common business transactions where the defendants are not so clearly overreaching.

47. LAFAVE, *supra* note 7, at 962–63; SALTZBURG ET AL., *supra* note 5, at 554 ("The crime of false pretenses requires a belief, however slight, on the part of the victim that the misrepresented fact is as the defendant represents it. If the victim knows the defendant is lying, there can be no reliance.").

48. United States v. Svete, 556 F.3d 1157, 1166–67 (11th Cir. 2009).

49. United States v. Brown, 79 F.3d 1550, 1553–54 (11th Cir. 1996), *overruled by Svete*, 556 F.3d 1157.

ble external sources."[50] The court in *Brown* reasoned that "reasonable jurors could not find that a person of ordinary prudence, about to enter into an agreement to purchase [a home,] would rely on . . . the seller's own affirmative representations about the value or rental income of [the home] . . . ."[51] But if price is a material term, and if we have moved away from "buyer beware" toward a more paternalistic commercial regime, then the omission of this fact could be a misrepresentation, and a charge for fraud can stand. Accordingly, the Eleventh Circuit recently overruled *Brown*, holding in *United States v. Svete* that a scheme to defraud does not require that a person of ordinary prudence be deceived.[52]

The Eleventh Circuit's *Svete* decision demonstrates that what is expected to be affirmatively disclosed during a sale is a moving target depending on the sophistication and knowledge of the other party to a commercial exchange. *Svete* removed the requirement that a person of ordinary prudence be deceived.[53] While this properly aims to protect the vulnerable, it still leaves unclear what must actually be disclosed during a commercial transaction. Indeed, what must be disclosed depends entirely on the one to whom it is (or is not) disclosed. While the Model Penal Code requires courts and juries to take account of commercial realities while also criminalizing false promises,[54] cases like *Svete* magnify the risk that an ordinary business transaction could turn into a criminal prosecution. When is it legal to exploit a clever bargain, and on the other hand, when does making a good bargain lead to criminal charges?

Thus, both embezzlement, discussed above, and false pretenses illustrate the problems inherent in criminalizing vaguely defined failures to observe good business practices. The line between acceptable and criminal conduct remains dangerously thin and ill-defined, and both crimes become more attractive to prosecutors during an economic downturn. The Eleventh Circuit's failed *Brown* experiment helps to illustrate the narrow line between clever business practices and fraudulent misrepresentation; ultimately, businesspeople have little guidance as they conduct their transactions. In true borderline cases,

50. *Id.* at 1559 (citing Adolescent Psychiatry, S.C. v. Home Life Ins. Co., 941 F.2d 561, 570 (7th Cir. 1991)).

51. *Id.*

52. *Svete*, 556 F.3d at 1166–67.

53. *Id.*

54. *See* MODEL PENAL CODE § 223.3 (1985).

> [i]t is not enough to say that if innocent the accused would be found not guilty. The social stigma attaching to one accused of a crime as well as the burdens incident to the defense would, irrespective of the outcome, place a devastating weapon in the hands of a disgruntled or disappointed creditor.[55]

Faced with this very real threat, what are people to do to ensure that a profitable transaction is not characterized as criminal?

B. Other Ambiguous Crimes

1. Extortion: Negotiation Gone Wrong

Extortion is yet another crime fraught with ambiguity in its application, thus posing a great danger of criminalizing conduct commonly accepted as legitimate. Extortion is generally defined as (1) the use of a threat (2) in an attempt to obtain (or in some states actually obtaining) (3) property from another person or some action from another person.[56] Statutes specify the types of threats that qualify, including generally accusation of a crime, a disgrace, or an unlawful injury.[57] Blackmail is the colloquial name for the crime when the threat involves disclosure of a secret.[58]

While even the term extortion exudes the gravity of the offense, it is remarkably a crime that often envelopes ordinarily acceptable conduct. Extortion particularly clashes with the United States' pro-settlement culture. While nearly all civil suits settle before trial, ordinary settlement negotiations may lead to criminal charges. For example, it is easy to label an attorney or negotiator an extortionist. In one such case prosecuted early in his career by Senator Patrick Leahy, an attorney negotiated a divorce settlement on behalf of an abused wife.[59] The attorney threatened to disclose

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55. Chaplin v. United States, 157 F.2d 697, 699 (D.C. Cir. 1946).

56. LAFAVE, *supra* note 7, at 1013–14.

57. LAFAVE & SCOTT, *supra* note 6, at 789; *see, e.g.*, CAL. PENAL CODE § 518 (West 2010); FLA. STAT. ANN. § 703.18 (West 2000); N.Y. PENAL LAW § 155.05 (Gould 2010).

58. *See* Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. CHI. L. REV. 795, 796 (1998) ("I am legally free te [sic] reveal embarrassing information about you. Generally speaking, I am also free te [sic] negotiato [sic] payment to refrain from exercising a legal right. But if I combine the two—offering te [sic] remain silent for a fee—I am guilty of a felony: blackmail."). *See generally* Walter Block, *Threats, Blackmail, Extortion and Robbery and Other Bad Things*, 35 TULSA L.J. 333 (2000) (concluding blackmail should not be criminal).

59. State v. Harrington, 260 A.2d 692 (Vt. 1969); *see also Murky Legal Turf in Blackmail Case Against Lawyer Couple*, MY SAN ANTONIO NEWS (Sep. 12, 2007, 2:00 AM), http://

the husband's adultery in divorce proceedings unless the husband agreed to a reasonable settlement.[60] For his tactics, the attorney was convicted of extortion and imprisoned, although his sentence was later commuted.[61] Undoubtedly, the case was influenced by the context.[62] The divorce attorney had set up the husband with a young woman and arranged to have his encounter (interrupted before sexual consummation) photographed.[63] Nevertheless, the extortion charge would appear to cover routine pre-divorce negotiation. Prominent attorney and Harvard Law School professor Alan Dershowitz was accused of extortion by opposing counsel for his negotiations on behalf of Mia Farrow in her divorce battle with Woody Allen.[64] Dershowitz was alleged to have sought a favorable divorce settlement in lieu of pressing child abuse allegations against Allen, which were intertwined in the divorce controversy.[65]

Extortion charges touch upon all manner of ordinary negotiations. In California, an attorney was convicted of extortion for taking $2000 from a client's employee suspected of theft after informing him that "unless he immediately paid defendant $2000 for the purpose of settling with [the employer], he would be sent to prison for 7 or 10 years."[66] Such cases have prompted reforms, accepted only by some courts, that claim of right should be a defense to extortion.[67] Thus, the rule—that "[t]he law does not contemplate the use of criminal process as a means of collecting a debt"[68]—has in some places given way to a more nuanced approach. For example, in *United States v. Jackson*,[69] the Second Circuit reinterpreted the federal extortion statute to not include threats to expose secrets by creditors who are merely attempting to regain what is justly their due. In *Jackson*, the court noted that the young woman, who claimed to be Bill Cosby's out-of-wedlock daughter, likely requested more than she could argue was her right as a

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www.mysanantonio.com/news/MYSA091205_1A_roberts_folo_8bc8cf1_html2405.html?showFullArticle=y.

60. *Harrington*, 260 A.2d at 695–96.

61. *See* SALTZBURG ET AL., *supra* note 5, at 579; *see also In re* Harrington, 367 A.2d 161 (Vt. 1976).

62. *See Harrington*, 260 A.2d at 699 ("The incriminating evidence which his letter threatens to expose was wilfully [sic] contrived and procured by a temptress hired for that purpose.").

63. *Id.* at 694.

64. *See* Paula Span, *The Brawling Barristers: Abramowitz & Woody v. Dershowitz & Mia*, WASH. POST, Apr. 17, 1993, at C1.

65. *Id.*

66. People v. Beggs, 172 P. 152, 153 (Cal. 1918).

67. *See* LAFAVE, *supra* note 7, at 1015–16.

68. *Beggs*, 172 P. at 154.

69. United States v. Jackson, 180 F.3d 55, 70–71 (2d Cir. 1999).

daughter.[70] Nevertheless, the court transformed and limited extortion to avoid an overbroad interpretation, holding that a claim of right can defeat a charge of extortion where the threatened disclosure would cause payment of the money demanded.[71] *Jackson*'s interpretation has major implications in the law of extortion by removing some commonly accepted negotiating conduct from the threat of the criminal sanction. In the above example regarding the attorney who threatened to charge the employee, the threatened disclosure—telling the police that the employee had stolen—could lead directly to reimbursement. Arguably, under the *Jackson* interpretation, this claim of right would have led to an acquittal in that case because there was no wrongful intent and because the threatened disclosure would have led to payment of the debt.[72]

While *Jackson*'s interpretation limits the reach of extortion, merely recognizing claim of right as a defense does not eliminate extortion's broad reach into conduct generally accepted as legitimate by society. Threatening to breach a contract, as entertainers regularly do, in order to renegotiate a contract to reflect a television show's success might constitute threatening an unlawful injury, which would be criminal extortion under many statutes.[73] As a threshold matter, the determination of whether the entertainer enjoys a claim of right (perhaps unjust enrichment) and whether his threats to breach would in fact encourage repayment (e.g., reformation of the contract) if acted upon would be left to the prosecutor (or a grand jury). To allow such a broad interpretation is to invite enormous prosecutorial discretion. Consider *People v. Squillante*,[74] where the court upheld the extortion conviction of a union official when the union threatened to picket a store unless it started using union garbage collectors. The court reasoned that the union had threatened unlawful injury, picketing, to obtain the advantage of other contracts.[75]

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70. *Id.* at 71.

71. The court distinguished between threatened disclosures with no nexus to the claim of right and those with a nexus to the claim of right. The former, such as threats to expose sexual indiscretions, would still be actionable as extortion because there is no nexus to the claim of right, while the latter, such as exposing a consumer complaint or past due debt, might lead directly to the payment of the money due: "In the former category of threats, the disclosures themselves—not only the threats—have the potential for causing payment of the money demanded; in the latter category, it is only the threat that has that potential, and actual disclosure would frustrate the prospect of payment." *Id.* at 70–71.

72. *See id.*

73. *See* MODEL PENAL CODE § 223.4 cmt. at 210 (1980); Mark Harris, *The $9 Million Maybe*, ENT. WKLY. (Apr. 9, 1993), http://www.ew.com/ew/article/0,,306128,00.html.

74. People v. Squillante, 169 N.E.2d 425, 426 (N.Y. 1960).

75. *Id.*

While extortion can address what are clearly wrongful threats and blackmail, its elasticity offers opportunities to prosecutors who want to target more accepted or benign threats. As *Squillante* shows, the extortion crime also offers an opportunity to prosecute potentially unpopular local figures for what many might view as legitimate bargaining tactics. And despite *Jackson*, the claim of right defense is not universally accepted.[76] Thus, people like the attorney who negotiated for the return of the employer's stolen property must think carefully before threatening disclosure of the employee's theft, lest they risk imprisonment. Extortion requires attorneys and negotiators to carefully consider whether their demands will later be characterized as extortion. As with the theft crimes previously discussed, the enormous ambiguity inherent in extortion threatens to swallow what is ordinarily regarded as legitimate behavior.

2. Political Extortion: Separating Donations from Crimes

Political extortion is a particularly dangerous crime for those concerned with the exploitation of criminal accusation in political contexts. The common law definition of the crime is a public official extorting property under color of official right.[77] As Justice Scalia discussed in his concurrence in *McCormick v. United States*, political extortion under the common law was limited to collecting fees such as taxes ostensibly for the state and then misappropriating them.[78]

The Court in *McCormick* accepted an extension that, in essence, allows what is commonly considered bribery to be incorporated into political extortion.[79] In *McCormick*, a defendant state legislator sought contributions for his campaign from foreign-educated doctors, reminding them that he had supported legislation that allowed them to practice in his state.[80] The defendant received a contribution from the lobbyist group both before and after he

76. *See* LAFAVE, *supra* note 7, at 1014–15.

77. McCormick v. United States, 500 U.S. 257, 279 (1991) (Scalia, J., concurring).

78. *See id.*

79. *Id.* at 279 ("Finally, where the United States Code explicitly criminalizes conduct such as that alleged in the present case, it calls the crime bribery, not extortion—and like all bribery laws I am aware of (but unlike § 1951 and all other extortion laws I am aware of) it punishes not only the person receiving the payment but the person making it."). Because of the often overlapping nature of the two crimes, some of the analysis in the next sub-Part, discussing problems related to bribery, will also relate to problems with the ambiguity and politicization of political extortion.

80. *Id.* at 259–60 (majority opinion).

spoke in favor of extending the legislation.[81] The trial court, appellate court, and Supreme Court struggled with defining the difference between legitimate campaign contributions and political extortion.

The trial court first accepted the extension of extortion to include the use of one's office to wrongfully gain property.[82] The trial court jury instruction distinguished a voluntary contribution from political extortion, in that the former was "freely given without expectation of benefit."[83] In distinguishing the two, the district court's instruction included the following language:

> It would not be illegal, in and of itself, for Mr. McCormick to solicit or accept political contributions from foreign doctors who would benefit from this legislation. . . . In order to find Mr. McCormick guilty of extortion, you must be convinced beyond a reasonable doubt that the payment alleged in a given count of the indictment was made by or on behalf of the doctors *with the expectation that such payment would influence Mr. McCormick's official conduct, and with knowledge on the part of Mr. McCormick that they were paid to him with that expectation by virtue of the office he held.*[84]

The Fourth Circuit affirmed the conviction, offering nonexclusive "factors" that could indicate whether or not a gift was criminal or a legitimate campaign contribution:

> (1) [W]hether the money was recorded by the payor as a campaign contribution, (2) whether the money was recorded and reported by the official as a campaign contribution, (3) whether the payment was in cash, (4) whether it was delivered to the official personally or to his campaign, (5) whether the official acted in his official capacity at or near the time of the payment for the benefit of the payor or supported legislation that would benefit the payor, (6) whether the official had supported similar legislation before the time of the payment, and (7) whether the official had directly or indirectly solicited the payor individually for the payment.[85]

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81. *Id.* at 260.
82. *Id.* at 264–65.
83. *Id.* at 265.
84. *Id.* (emphasis added).
85. *Id.* at 269 n.7 (quoting United States v. McCormick, 896 F.2d 61, 66 (4th Cir. 1990)).

The Supreme Court reversed the conviction, noting that the first four factors "could not possibly by themselves amount to extortion" and that while the last three factors are "more telling," satisfaction of all seven factors would not necessarily establish the crime.[86] The Court held that there must be proof of a specific quid pro quo, stating that "[w]hether described familiarly as a payoff or with the Latinate precision of *quid pro quo*, the prohibited exchange is the same: a public official may not demand payment as inducement for the promise to perform (or not to perform) an official act."[87]

While the majority treated finding a quid pro quo as a simple issue, Justice Stevens expressed dissatisfaction in his dissent:

> [T]he crime of extortion was complete when [McCormick] accepted the cash pursuant to an understanding that he would not carry out his earlier threat to withhold official action and instead would go forward with his contingent promise to take favorable action on behalf of the unlicensed physicians. . . . [P]roof of a subsequent *quid pro quo*—his actual support of the legislation—was not necessary for the Government's case. And conversely, evidence that [McCormick] would have supported the legislation anyway is not a defense to the already completed crime.[88]

This disputed decision demonstrates how difficult discerning the line between proper campaign contributions and criminal political extortion can be. The district court, Fourth Circuit, and Supreme Court majority and dissent all offered their separate definitions of political extortion. Political extortion charges can arise in the process of seeking contributions, and the desire of contributors to flex their muscle to support officials who agree with their position of legislation and other public policy makes very subtle the distinction between a contribution and a bribe-like political extortion. The Supreme Court's demand of an explicit agreement helps by narrowing liability, but it still leaves undefined how specific that agreement must be.

In *Evans v. United States*,[89] which also addressed political extortion under the Hobbs Act, the Supreme Court revisited the quid pro quo requirement articulated in *McCormick*, holding that "the Government need only show that a public official has obtained a

86. *Id.* at 272.
87. *Id.* at 273 (quoting United States v. Dozier, 672 F.2d 531, 537 (5th Cir. 1982)).
88. *Id.* at 283 (Stevens, J., dissenting).
89. 504 U.S. 255 (1992).

payment to which he was not entitled, knowing that the payment was made for official acts."[90] In addition, the Court concluded that "fulfillment of the quid pro quo is not an element of the offense."[91]

In his partial concurring opinion in *Evans*, Justice Kennedy added more uncertainty to the state of *McCormick*'s explicit quid pro quo requirement:

> The official and the payor need not state the *quid pro quo* in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods. The inducement from the official is criminal if it is express or if it is implied from his words and actions, so long as he intends it to be so and the payor so interprets it.[92]

After *Evans*, the murky waters of *McCormick* become even less clear. The majority in *McCormick* candidly adopted the explicit quid pro quo requirement to delineate criminal extortion from the necessary and routine solicitation of campaign contributions. Yet *Evans* appears to require only that the public official have knowledge that a campaign contribution was given for an official act; the majority makes no mention of an express agreement, and Justice Kennedy disavows the requirement in his partial concurrence. The problem is that under our political system, campaign contributions are routinely used to reward public officials who cast legislative votes or make executive decisions favored by the contributor.[93] It is the way by which supporters help advance the reelection and advancement of public officials they admire and with whom they agree. It is also true that public officials regularly appoint to non-civil service public positions partisan supporters who share the official's political ideology and have supported and worked on behalf of the public official's candidacy.[94] Government appointments, such as fashionable ambassadorships or desirable commissions, are often rewards to those who helped a political candidate win.[95] They are far less frequently given to those who opposed the candidate's election. It would not be an exaggeration to

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90. *Id.* at 268.

91. *Id.*

92. *Id.* at 274 (Kennedy, J., concurring).

93. *See* Jonathan D. Salant & Julianna Goldman, *Obama Offers Prime Posts to Top Campaign Contributors*, BLOOMBERG (May 29, 2009, 12:24 PM), http://www.bloomberg.com/apps/ news?pid=washingtonstory&sid=adfv4RHV3Kmk.

94. *Id.*

95. *See* Amanda Royal, *Obama Administration Picks Wilson Sonsini CEO for Japan Ambassador Slot*, THE RECORDER (May 29, 2009), http://www.law.com/jsp/article.jsp?id=1202431065448.

say that most campaign contributions are given for political acts, and it is even murkier to surmise when the public official knew it. This is particularly true in the context of high-profile one-issue public debates such as health care legislation, abortion, and gun control, where contributions are commonly solicited and given for specific political action. Yet acceptance of such campaign contributions under *Evans* would appear to satisfy the elements of extortion under the Hobbs Act even when the official did not even fulfill the expectations of the campaign donor, provided only that the official knew for what act the payment was made. At least three circuits[96] have attempted to reconcile *McCormick* and *Evans* by suggesting express agreements are required for campaign contributions, but not other payments.[97] The Supreme Court has also not addressed whether the *McCormick* rule of explicit quid pro quo should also be applied to federal bribery and mail fraud statutes.

This is not to suggest that a political system infused with money is desirable, but rather that a system where it appears difficult to delineate the regular acceptance of campaign contributions from criminal extortion is dreadful. Given this political reality, even the explicit quid pro quo requirement in *McCormick* appears dangerously subtle. When is the quid pro quo only implicit and not criminally explicit? The answer is unfortunately not clear. The difference would not be so significant if the solicitation and acceptance by government officials of campaign contributions were not so commonplace, but our political system practically deems it necessary, appropriate, and indeed laudatory for the right causes.[98] Just like statutory extortion can encompass routine and indeed even desirable conduct, political extortion may afford prosecutors too much discretion to declare and characterize political conduct as criminal. In the context of hardball politics, that can be extremely dangerous.

One could take solace in the notion that whatever the definitional difficulties the courts have in formulating a criminal line between criminal quid pro quo and legitimate campaign contributions, Justice Stewart's famous characterization of pornography, "I know it when I see it,"[99] could also be applied to political extortion. Unfortunately, even the same courts can reach disparate conclusions

96. *See* United States v. Abbey, 560 F.3d 513, 517–18 (6th Cir. 2009); United States v. Kincaid-Chauncey, 556 F.3d 923, 936–37 (9th Cir. 2009); United States v. Ganim, 510 F.3d 134, 142 (2nd Cir. 2007).

97. *See* Evans v. United States, 504 U.S. 255, 257 (1992). In *Evans* itself, however, the defendant asserted the payments were all campaign contributions.

98. *See* Salant & Goldman, *supra* note 93.

99. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

about criminality when faced with the same facts. Consider former governor Don Siegelman's recent prosecution for bribery and honest services mail fraud related to his solicitation of a contribution to his Alabama Education Foundation from Richard Scrushy.[100] Following Scrushy's donation of $500,000, Governor Siegelman appointed him to the Certificate of Need Review Board, a state agency responsible for healthcare delivery in Alabama.[101] The jury convicted Siegelman of "one count of bribery, one count of conspiracy to commit honest services mail fraud, four counts of honest services mail fraud and one count of obstruction of justice."[102] However, the Eleventh Circuit released Siegelman on bond pending appeal after serving only nine months behind bars.[103] The court reasoned that Siegelman had raised "substantial questions" in his appeal.[104] It overruled a previous ruling by a federal district judge that Siegelman should stay in prison.[105] In *United States v. Siegelman*,[106] however, the Eleventh Circuit again upheld the Governor's convictions despite Siegelman's contention that the trial judge's instruction and the evidence did not satisfy the "explicit *quid pro*

100. Adam Nossiter, *Freed Ex-Governor of Alabama Talks of Abuse of Power*, N.Y. TIMES, March 29, 2008, at A13.

101. Bob Johnson, *Siegelman, Scrushy Lose Bid for Full Court Review*, SEATTLE TIMES (May 15, 2009, 12:05 PM), http://seattletimes.nwsource.com/html/nationworld/2009224195_apussiegelmantrialappeal.html.

102. Press Release, U.S. Dep't of Justice, Former Alabama Governor Don Siegelman, Former HealthSouth CEO Richard Scrushy Convicted of Bribery, Conspiracy and Fraud (June 29, 2006), *available at* http://www.usdoj.gov/opa/pr/2006/June/06_crm_409.html.

103. Nossiter, *supra* note 100, at A13.

104. *Id.* There were also allegations in the media that the prosecution was selective. Consider the following description:

> On May 8, 2002, Clayton Lamar (Lanny) Young Jr., a lobbyist and landfill developer described by acquaintances as a hard-drinking "good ole boy," was in an expansive mood. In the downtown offices of the U.S. Attorney in Montgomery, Ala., Young settled into his chair, personal lawyer at his side, and proceeded to tell a group of seasoned prosecutors and investigators that he had paid tens of thousands of dollars in apparently illegal campaign contributions to some of the biggest names in Alabama Republican politics. According to Young, among the recipients of his largesse were the state's former attorney general Jeff Sessions, now a U.S. Senator, and William Pryor Jr., Sessions' successor as attorney general and now a federal judge. Young, whose detailed statements are described in documents obtained by TIME, became a key witness in a major case in Alabama that brought down a high-profile politician and landed him in federal prison with an 88-month sentence. As it happened, however, that official was the top Democrat named by Young in a series of interviews, and none of the Republicans whose campaigns he fingered were investigated in the case, let alone prosecuted.

Adam Zagorin, *Selective Justice in Alabama?*, TIME (Oct. 4, 2007), http://www.time.com/time/nation/article/0,8599,1668220,00.html.

105. Nossiter, *supra* note 100, at A13.

106. United States v. Siegelman, 561 F.3d 1215 (11th Cir. 2009).

quo" requirement established in *McCormick.* The appellate court noted that the Supreme Court had not yet considered whether the requirement that the defendant make an explicit promise to establish a quid pro quo applied to the federal funds bribery and honest services mail fraud statutes as well as the Hobbs statute reviewed in *McCormick.*[107] Assuming that it did, however, the appellate court appeared to follow Justice Kennedy's concurrence in *Evans,*[108] concluding that the requirement of an "explicit" agreement did not require the agreement to be "express."[109] The court concluded that the explicit agreement may be implied from words and actions. In the Alabama governor's case, the trial judge instructed the jury that to convict for bribery, the prosecution must show "'the Defendant and official agree[d] that the official [would] take specific action in exchange for the thing of value.'"[110] The appellate court concluded that the Defendant's request for instructions that the agreement be express was not required. The appellate court also recited evidence provided by the Governor's former aide, that he periodically reminded the Governor of what Scrushy wanted for his contributions and that the Governor agreed with his own aide that he did not think that would be a problem.[111]

Cases like *Siegelman* raise the question whether the acceptance of otherwise lawful campaign contributions puts a public official in jeopardy of criminal prosecution when, even in the absence of any express agreement, the official acts in a manner consistent with the desires of his contributor. As observed above, three other federal circuits,[112] unlike *Siegelman,* have construed *McCormick* and *Evans* to require express quid pro quo to criminalize campaign contributions. The nuances of the *McCormick-Evans* quid pro quo issue are reflected in the highly publicized prosecution of former Illinois Governor Rodney Blagojevich, accused of a pay-to-play scheme to sell President Obama's former U.S. Senate seat.[113] The Illinois Governor had authority to appoint a replacement. FBI tapes recorded him saying to an aide, "I've got this thing . . . and it's [expletive] golden. And I'm just not giving it up for [expletive] nothing."[114]

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107. Id. at 1225.
108. Evans v. United States, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring).
109. Siegelman, 561 F.3d at 1226.
110. *Id.* at 1225.
111. *Id.* at 1221.
112. See supra note 96 and accompanying text.
113. *See* Monica Davey, *Governor Accused in Scheme to Sell Obama's Seat,* N.Y. TIMES, Dec. 10, 2008, at A1.
114. *Id.*

The tapes also indicated Blagojevich had hopes of attaining an ambassador or cabinet appointment.[115] The difficulty in establishing an explicit quid pro quo for value and not mere amorphous political gain is reflected in the failure of the prosecution to convict on 23 of the 24 charges against Blagojevich.[116] Neither *McCormick* nor *Evans* adequately differentiates between criminal felonies and the routine day-to-day wheeling-and-dealing and horse-trading necessary to achieve political compromise. *Siegelman* underscored the need for clarity in this context:

> The bribery, conspiracy and honest services mail fraud convictions in this case are based upon the donation Scrushy gave to Siegelman's education lottery campaign. As such, they impact the First Amendment's core values—protection of free political speech and the right to support issues of great public importance. It would be a particularly dangerous legal error from a civic point of view to instruct a jury that they may convict a defendant for his exercise of either of these constitutionally protected activities. In a political system that is based upon raising private contributions for campaigns for public office and for issue referenda, there is ample opportunity for that error to be committed.[117]

With the prolific use of fundraising in politics, the danger of delineating acceptable and criminal conduct remains significant.

3. Bribery: Finding the Line Between Legitimate and Criminal Conduct.

Bribery, like political extortion, is at the center of political corruption cases.[118] As the Supreme Court explained in *United States v. Sun-Diamond Growers*, bribery exists when "something of value was corruptly given, offered, or promised to a public official (as to the giver) or corruptly demanded, sought, received, accepted, or agreed to be received or accepted by a public official (as to the re-

115. *Id.*

116. *See* Monica Davey & Susan Saulny, *Blagojevich, Guilty on 1 of 24 Counts, Faces Retrial*, N.Y. TIMES, Aug. 18, 2010, at A1. Blagojevich was convicted of one count of making a false statement to the F.B.I. Id. The prosecution has indicated a desire to retry since reportedly all but one juror favored conviction on at least one other charge. Id.

117. *Siegelman*, 561 F.3d at 1224.

118. *See* James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From Common Law to the Hobbs Act*, 35 UCLA L. REV. 815, 815 (1988) ("When public officials are prosecuted for corruption, the two most common charges are extortion and bribery.").

cipient) with intent . . . 'to influence any official act' (giver) or in return for 'being influenced in the performance of any official act' (recipient)." [119] Aside from the issue of quid pro quo, bribery itself is fraught with additional vague contours. In bribery cases, both the finding of "corrupt" and the requirement that the bribe be meant to influence official action by the recipient are critical.[120] "Corrupt" purpose requires that the gift or other favor be intended to influence an official act, thus making motive the common subject of litigation.[121] More significant is the uncertainty over what constitutes an official act.[122] Consider *State v. Bowling*,[123] where legislators sought payment to recommend issuance of a liquor license. The court, quoting *United States v. Birdsall*,[124] observed:

> To constitute it official action, it was not necessary that it should be prescribed by statute; it was sufficient that it was governed by a lawful requirement of the Department under whose authority the officer was acting. Nor was it necessary that the requirement should be prescribed by a written rule or regulation. It might also be found in an established usage which constituted the common law of the Department and fixed the duties of those engaged in its activities.[125]

As indicated by *Birdsall*, the official action can be broadly construed beyond the specific resume of the employment.[126] Nevertheless, the court in *Bowling* found the legislator's action beyond the scope of official action, noting the lack of notice provided by the statute:

> [T]he subject statute draws no discernible line separating this type of concededly noncriminal conduct from that sought to be punished as a felony in this action. That the legislature has the power to delineate for punishment the type of conduct under consideration is not the question before us, but rather

119. United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 404 (1998).

120. *See* Lindgren, *supra* note 118, at 823–25.

121. *Id.* For a discussion of various definitions of "corrupt," see Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. REV. 784, 798–806 (1985).

122. See generally Steven J. Mulroy, "Official" Explanation: Defining "Official Capacity" and "Color of Office" Phrases in Bribery and Extortion Law, 38 U. MEM. L. REV. 587 (2008) (discussing this issue generally and also under Tennessee law).

123. 427 P.2d 928, 929–30 (Ariz. Ct. App. 1967).

124. 233 U.S. 223 (1913).

125. *Bowling*, 427 P.2d at 935 (citations omitted).

126. 233 U.S. at 230–31.

> whether it had done so at the time of the commission of these acts. We hold that it had not.[127]

In reversing the convictions, the court in *Bowling* cited with approval various questions raised by the defendant's brief:

> Would they violate the statute by accepting remuneration for a speaking engagement on behalf of a local candidate for office? How about a legislator-attorney who represents a property holder on a variance before a local zoning board? Or a legislator-physician who accepted a free dinner to speak for or against medicare [sic]?[128]

The *Bowling* defendants' arguments, ultimately persuasive to the Arizona Court of Appeals, raise the question of when an attorney, for example, serving on a city zoning board, could accept fees to represent a client in another context.[129] By contrast, in *Commonwealth v. Bellis*, a Philadelphia City Council member was convicted of bribery for accepting $62,000 to represent several corporations seeking licenses and contracts from the city.[130] Although the council member represented the corporations in front of city agencies and did nothing for them in the city council, the court concluded that the Pennsylvania statute did "not require that the bribe influence or intend to influence a matter that is within the [public official's] official duties" but instead requires only a "bribe . . . for showing any favor or disfavor in relation to the affairs or business of his principal, employer, or master."[131]

This issue of conflicting loyalties has been debated in the context of Hillary Clinton's former law firm, which used to receive client fees from corporations who inevitably had business in front of her husband, then the governor of Arkansas.[132] Indeed, with pro-

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127. 427 P.2d at 936 (footnote omitted).

128. *Id.*

129. *See* Mulroy, *supra* note 122, at 591 ("As part of their 'day jobs,' these part-time legislators often represent clients as lawyers, financial advisers, lobbyists, or consultants, and sometimes for clients who may have business of some form before local government. . . . Such instances raise the related but distinct legal question of how to analyze conduct by part-time officials who 'wear two hats.' Where a lawyer, lobbyist, or consultant is paid a fee for legal, lobbying, or consulting work while simultaneously serving as a public official in a matter directly or indirectly related to such work, is the payment made in the person's official or unofficial capacity? The former is criminally punishable, the latter is not. How does the law determine which hat one is wearing.").

130. 399 A.2d 397 (Pa. 1979).

131. *Id.* at 399.

132. *See, e.g.*, Jeff Gerth, *Clintons Joined S. & L. Operator in an Ozark Real-Estate Venture*, N.Y. TIMES, Mar. 8, 1992, at A1.

fessional couples, now the norm, the issue becomes even more prevalent. Even without focusing on couples, almost no major political figure can avoid some contexts subject to criticism. For example, President Obama was given the opportunity to purchase property near his new home by a friend and fundraiser now facing criminal charges.[133] Senator McCain has been given support by a fundraiser who sought and received the constituent service of an endorsement while seeking a government contract.[134] In short, the line is very blurry and leaves politicians vulnerable to bribery charges. Indeed, the political gains to be had in embroiling a candidate or member of the opposite party in a criminal investigation can risk motivating or pressuring some prosecutors into indicting or declining to prosecute when they should not.[135]

Bribery's elasticity is exacerbated by the lack of proof that pervades most bribery cases. An attempt to prove that a bribe is not actually an innocent campaign contribution will often find a paperless trail[136] and is also unlikely to include a complaining victim.[137] It is this elusiveness of evidence of bribery that both protects the guilty and threatens the innocent. The Fifth Circuit noted that "the

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133. *See, e.g.*, Peter Slevin, *Obama Says He Regrets Land Deal with Fundraiser*, WASH. POST, Dec. 17, 2006, at A6.

134. *See* Jim Rutenberg et al., *For McCain, Self-Confidence on Ethics Poses Its Own Risk*, N.Y. TIMES, Feb. 21, 2008, at A1.

135. James Fleissner, Comment, *Prosecuting Public Officials Under the Hobbs Act: Inducement as an Element of Extortion Under Color of Official Right*, 52 U. CHI. L. REV. 1066, 1086–1087 (1985). There is evidence of selective prosecution of one party over another. A study by Professor Shields of the University of Missouri-St. Louis, about which he later testified before the House Judiciary Committee, noted that the national "party affiliation of elected officials is roughly 50 percent Democrat, 41 percent Republican and 9 percent Independent." *Allegations of Selective Prosecution: The Erosion of Public Confidence in Our Federal Justice System Before the H. Comm. on the Judiciary*, 110th Cong. 224 (2007) (statement of Donald Shields, Professor, University of Missouri-St. Louis) [hereinafter *Selective Prosecution*], *available at* http://judiciary.house.gov/hearings/hear_102307_2.html. While "[t]hese investigation rates mirror the national percentages of 50 percent Democrat, 41 percent Republican, and 9 percent Independent-Other," id., Professor Shields explained that "when it comes to investigation and indictment of local officials by the DOJ, the numbers are staggeringly disproportionate—80 percent Democrats, 14 percent Republicans, 6 percent Independent. That is 5.6 Democrats investigated for each Republican, 5.6-to-1 when the ratio should be 1.2-to-1, and that is out of 820 investigations . . . ." *Id.* at 224–25.

136. In the political extortion context, Justice Kennedy, arguing that the *quid pro quo* must be *explicit* but not *express*, noted that the "law's effect could be frustrated by knowing winks and nods." Evans v. United States, 504 U.S. 255, 274 (1992) (Kennedy, J., concurring); *see also* Lowenstein, *supra* note 121, at 786–87 ("In particular, the bribery laws are supposed to require a *quid pro quo*—an explicit exchange of a specific benefit for a specific official action (or inaction)—a requirement that is evaded easily, and is difficult to prove even when it has not been evaded. Thus, the difficulty with bribery laws is supposed to be ineffectiveness rather than uncertainty." (footnote omitted)).

137. *See* RONALD JAY ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 568 (2d ed. 2005).

process of arranging a payment will often involve a subtle, and largely unspoken, negotiation period, during which each side ensures the intentions of the other."[138] If the negotiation is unspoken, then how does one distinguish a gift from a bribe or a contribution from a payoff? It would certainly be a question for the fact finder, but there should be a clearer rule to give prosecutors better guidance before they level expensive, potentially career-destroying allegations, given that

> [n]o politician who knows the identity and business interests of his campaign contributors is ever completely devoid of knowledge as to the inspiration behind the donation. There must be more specific knowledge of a definite official act for which the contributor intends to compensate before an official's action crosses the line between guilt and innocence.[139]

The determination of specific knowledge, and what constitutes proof when a smoking gun recording or document is lacking, is left initially to the prosecutor.

Undoubtedly prosecutors require leeway to both dissuade and prosecute officials for bribery, but if the office pursues cases too often with questionable motivation and shaky evidence, the public will eventually grow tired—or worse, will grow accustomed to accusations of corruption—leaving the response to the truly invidious dangerously anemic.

United States v. Singleton[140] represents an ironic twist on the danger of bribery being applied to what is considered legitimate conduct. In that case, a three-judge panel of the Tenth Circuit held plea bargain deals in exchange for truthful testimony constituted criminal bribery on the part of the prosecutor. The *en banc* panel reversed, with three judges still dissenting and two recognizing the bribery statute was implicated by its language, but holding that Congress never intended that application.[141] The court's analysis

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138. United States v. Pattan, 931 F.2d 1035, 1040 n.9 (5th Cir. 1991).

139. United States v. Brewster, 506 F.2d 62, 81 (D.C. Cir. 1974)

140. 165 F.3d 1297, 1303 (10th Cir. 1999). The determination that the prosecutor's conduct constituted bribery resulted in an initial reversal of conviction against the defendant. *Id.*

141. In support of this interpretation, the Tenth Circuit noted the common law history of the government's power to offer leniency in exchange for testimony:

> From the common law, we have drawn a longstanding practice sanctioning the testimony of accomplices against their confederates in exchange for leniency. Indeed, [n]o practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defend-

suggests that there needs to be an interpretive commitment not to read a criminal statute literally, but rather to limit its meaning to the core wrong, aiming to avoid absurd results that criminalize acceptable conduct.

When prosecutors' well-established prosecutorial tactics can arguably be characterized as bribery, one must seriously consider whether the criminal law's potential reach extends too far. In addition, one must not forget the effects on the public perception of government legitimacy—overreaching criminalization damages not only the charged, but also the public itself.

4. Obstruction of Justice

Perhaps more than any crime, obstruction of justice invites expansive, elastic application. A typical federal statute reads as follows:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, . . . or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of

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ant is charged and having that witness testify under a plea bargain that promises him a reduced sentence.

> This ingrained practice of granting lenience in exchange for testimony has created a vested sovereign prerogative in the government. It follows that if the practice can be traced to the common law, it has acquired stature akin to the special privilege of kings. However, in an American criminal prosecution, the granting of lenience is an authority that can only be exercised by the United States through its prosecutor; therefore, any reading of section 201(c)(2) that would restrict the exercise of this power is surely a diminution of sovereignty not countenanced in our jurisprudence.
>
> Moreover, in light of the longstanding practice of leniency for testimony, we must presume if Congress had intended that section 201(c)(2) overturn this ingrained aspect of American legal culture, it would have done so in *clear, unmistakable, and unarguable language.*

Id. at 1301 (emphasis added) (citations omitted). For general discussion of this case, see generally A. Jack Finklea, Note, *Leniency in Exchange for Testimony: Bribery or Effective Prosecution?*, 33 IND. L. REV. 957 (2000).

> justice, shall be punished as provided in subsection (b) [which imposes a maximum sentence of ten years in prison except in extreme cases, such as those involving murder or attempted murder].[142]

Unlike the original common law accessory after the fact,[143] which broader conspiracy statutes have overwhelmed,[144] obstruction of justice can be broadly construed. Obstruction of justice charges may be leveled against companies when investigations or lawsuits are pending. In one case, merely sending an email asking employees to follow standard procedure in cleaning up files led to a high-profile criminal prosecution.[145]

Obstruction of justice can also be used in expansive ways to target political figures. Most notably, Special Prosecutor Kenneth Starr argued that President Clinton's denial of an extra-marital affair to his White House aides constituted an attempt to obstruct justice since the aides might be called to testify.[146] Even arguing a new secret service privilege from disclosure was argued by Starr to be an obstruction.[147] In total, President Clinton faced four separate charges of obstruction of justice.[148]

While guilt depends on mens rea, the fluidity of the obstruction statute invites creative and expansive prosecutorial interpretation. Starr's arguments show how the obstruction statute can be applied even to a good faith legal argument or the ever so common denial of an embarrassing secret. The broad language of the obstruction of justice statute invites creative prosecutors to bring obstruction of justice charges against political opponents in cases where other

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142. 18 U.S.C. § 1503(a) (2006).

143. The common law elements of accessory after the fact include: (1) a felony has been committed; (2) the defendant knows the felon committed the crime; (3) the defendant aids the felon; (4) with the purpose of hindering his or her apprehension by authorities. *See* LAFAVE & SCOTT, *supra* note 6, § 6.9(a).

144. *Compare id., with* LAFAVE, *supra* note 7, at 621 ("In the case of conspiracy, there must be: (1) an agreement between two or more persons, which constitutes the act; and (2) an intent thereby to achieve a certain objective which, under the common law definition, is the doing of either an unlawful act or a lawful act by unlawful means. Many jurisdictions also require an overt act in furtherance of the conspiracy, but this is usually viewed as an evidentiary requirement.").

145. United States v. Quattrone, 441 F.3d 153 (2d Cir. 2006); *see also* Arthur Andersen v. United States, 544 U.S. 696 (2005); Andrew Ross Sorkin, *Quattrone May Avoid 3rd Trial*, N.Y. TIMES, Aug. 19, 2006, at C1.

146. OFFICE OF THE INDEP. COUNSEL, THE STARR REPORT: THE OFFICIAL REPORT OF THE INDEPENDENT COUNSEL'S INVESTIGATION OF THE PRESIDENT, H.R. DOC. NO. 105-310 (1998) [hereinafter STARR REPORT], *available at* http://www.gpoaccess.gov/icreport/report/1cover.htm.

147. *Id.*

148. *See id.*

charges might not stick. While there are obvious cases where obstruction of justice charges would be appropriate, the broad language of the statute includes a variety of conduct.[149]

Obstruction of justice is yet another crime which threatens to encompass ordinary conduct in certain cases—following a document retention policy, denying an affair, or arguing for a secret service privilege. Like the other crimes discussed above, merely being charged can have drastic effects, and because the crime itself involves destruction of evidence, the danger of stigmatic harm is great. The following Part discusses ways to prevent the greater harm of a criminal conviction for obstruction of justice and the other crimes discussed above.

II. THE CASE FOR LIMITING CRIMINAL EXPANSION

A. Prosecutorial Discretion Is Insufficient to Curb These Problems

In this Article, I have shown the ambiguity inherent in many crimes, and I have also shown the dangers of selective prosecution accompanied by the expansion of criminal law to cover behavior previously not considered criminal. With certain crimes, such as extortion and the theft crimes, it becomes clear that what may be considered either well-accepted forms of private behavior[150] or vaguely defined breaches of either corporate policy[151] or commercial standards[152] may be met with criminal sanctions. These expansions raise the questions of whether there was ever any notice that the actions complained of were criminal and whether actions are appropriately criminalized given the availability of private, civil remedies. In other examples discussed above, such as political extortion, bribery, and obstruction of justice, the potential for political motivation and selective prosecution is ever-present.[153]

149. Of course, bringing obstruction of justice charges can have a drastic effect on the accused, be it a company, *see Arthur Andersen*, 544 U.S. at 697, corporate executive, *see Quattrone*, 441 F.3d at 154, or politician, *see* STARR REPORT, *supra* note 146. "The combination of a social inference of guilt from investigation or indictment and the heightened inferential basis for guilt where a charge of destruction of evidence is involved creates a circumstance where the danger of unfounded social stigma is particularly strong." Daniel Shtob, Note, *Corruption of a Term: The Problematic Nature of 18 U.S.C. 1512(c), the New Federal Obstruction of Justice Provision*, 57 VAND. L. REV. 1429, 1458–59 (2009). Indeed, "[w]hile selective prosecution is not unique to obstruction of justice, the inferential nature of many obstruction of justice accusations invites abuse." *Id.* at 1455.

150. *See supra* Part I.B.1–2.

151. *See supra* Part I.A.1 (discussing embezzlement).

152. *See supra* Part I.A.2 (discussing false pretenses).

153. *See supra* Part I.B.2–4.

These examples illustrate a risk: prosecutors can stretch either a statute or a common law definition of a crime to cover behavior never yet thought illegal or indistinguishable from generally practiced behavior.

At the center of these issues lies the role of prosecutorial discretion—and its insufficiency in curbing both the expansion of crime and selective prosecution. [154]

The stigmatic harm, while great in itself, is accompanied by financial harm in the cost of legal defenses.[155] Despite these enormous consequences, prosecutors have incredible discretion in choosing whom to charge and with what crime because "no prosecutor can even investigate all of the cases in which he receives complaints."[156] This enormous discretion may lead to pressure to prosecute unpopular groups, as "[i]n times of fear or hysteria political, racial, religious, social, and economic groups, often from the best of motives, cry for the scalps of individuals or groups because they do not like their views."[157] While this temptation should be resisted, there is always danger that prosecutorial discretion may be exercised in a biased or partisan fashion.[158]

Part of the reason that prosecutorial discretion alone is not enough to curb the expansion of criminal law is that, as discussed above, selective prosecution is so difficult to prove.[159] It is difficult, for example, for the courts to evaluate the propriety of a prosecutor's decision to bring a charge without studying complex issues of

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154. *See* JOSEPH F. LAWLESS, PROSECUTORIAL MISCONDUCT § 3.01 (4th ed. 2008) ("Once an individual is charged with a crime—regardless of the outcome—his life will never be the same. From the moment an arrest is made, a complaint is filed or a target letter is received, the client will experience fear and anxiety, will incur significant legal expenses and, in many cases, will encounter public ridicule and scorn. Even if counsel successfully arranges for the charges to be dismissed at the pre-trial stage or obtains an acquittal at trial, most of the client's family, friends, and business associates will be skeptical. Rather, than believing that your client was a citizen unjustly accused and subsequently vindicated, most will feel that a smart lawyer 'got him off.'").

155. *See* sources cited *supra* note 149 and accompanying text (discussing stigmatic harm and cost of legal defense generally).

156. Jackson, *supra* note 25.

157. *Id.*

158. *See Selective Prosecution*, *supra* note 135.

159. For instance, in order to establish an equal protection violation in the charging decision, a criminal defendant must present clear and convincing evidence. *See* United States v. Armstrong, 517 U.S. 456, 470 (1996); *see also* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."). This high standard is in part grounded in the practical difficulties of determining whether a prosecutor acted unconstitutionally.

resource allocation.[160] Thus, prosecutors have "an enormous amount of power to decide what the criminal law will really mean in their jurisdictions,"[161] but whether they bring charges at all and what charges they bring is virtually within their unrestricted discretion.[162] "While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst."[163]

Of course, broad prosecutorial discretion is not without its supporters. Creative and aggressive use of criminal statutes can be arguably characterized as praiseworthy. Conduct commonly thought of as wrongful or immoral will not slip through criminal loopholes. Society will be protected from conduct worthy of condemnation. The innocent will be protected, and the prosecutor need not wait for the legislator to catch up with the times and draft a new law to cover something that should be condemned.

Therein lie both the problem and the need for a solution outside of mere prosecutorial discretion. "The prosecutor has more control over life, liberty, and reputation than any other person in America,"[164] yet "there is no outside authority overseeing and checking the propriety of the executive's investigative decisions, including decisions *not* to investigate or prosecute suspected offenders."[165] Thus, prosecutorial discretion alone may not be enough to curb the influence of politics or viewpoints on criminal accusations. The examples shown above of criminal law being stretched to cover commonly acceptable conduct and the risk of selective prosecution based on political affiliation show the dangers of an unchecked, overzealous and/or politically motivated prosecutor. This Article attempts to advance appropriate solutions to limit such excessive prosecutions.

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160 *See, e.g.*, ALLEN ET AL., *supra* note 137, at 1050 ("[W]hat, exactly, is the practical obstacle to judicial regulation of prosecutorial charging decisions? One possible answer is that such regulation would involve the courts in complex resource allocation judgments—that only the prosecutor knows what mix of cases she has before her, and hence only the prosecutor knows what the opportunity cost of prosecuting in any given case is."); *see also* LAWLESS, *supra* note 154 (discussing the judicial reluctance to utilize or enforce remedies for prosecutorial misconduct.).

161. ALLEN ET AL., *supra* note 137, at 1045.

162. *Id.*

163. Jackson, *supra* note 25.

164. *Id.*

165. Diana Viggiano, *Aiming the Canons at the General: How Should Traditional Canons of Legal Ethics Constrain an Attorney General?*, 22 GEO. J. LEGAL ETHICS 1193, 1194 (2009).

B. Curbing Aggressive Expansion and Selective Prosecution

This Article does not attempt to provide a mechanism to check prosecutorial discretion as such. Rather, it proposes solutions that could help ensure that criminal law is applied faithfully and fairly despite potential lapses in prosecutorial discretion. Thus, these solutions would come into play when the law is being aggressively expanded by the prosecutor's interpretation and/or when there is a danger of political bias. The solutions, to be discussed below, are a reinvigoration of the rule of lenity and incorporation of the English requirement of dishonesty in theft crimes. Both of them, either individually or working together, could reduce these problems.

1. The Rule of Lenity Prevents Overly Aggressive Uses of Criminal Law and Selective Prosecution

The first recommended solution is a reinvigoration of the rule of lenity as a statutory interpretation canon. Both the expansive interpretations of criminal law, discussed above, and the politically motivated prosecutions flout the lessons of a too often ignored rule of lenity, a historic common law canon of statutory interpretation. The rule of lenity has been defined as requiring that "if the punitive statute does not clearly outlaw private conduct," the private actor cannot be penalized.[166]

A number of justifications for this rule have been advanced:[167] first, fair notice; second, humanitarian considerations, most particularly in the context of capital punishment; third, the protection of separation of powers by limiting the judiciary's ability to legislate crime by expansive interpretation.[168] The rule also ensures that the legislature, and not the executive acting through its agent-prosecutor, proscribes and determines the threshold of criminal behavior.[169] Importantly, the rule of lenity is unnecessary if prosecutors do not choose to aggressively expand the criminal law: if prosecutors carefully exercise discretion and decline to prosecute where there is little notice—for instance, where a statute does not clearly proscribe the conduct as criminal—there will be no need

166. WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 852 (3rd ed. 2001). For an excellent discussion of the history of lenity, see Lawrence M. Solan, *Law, Language and Lenity*, 40 WM. & MARY L. REV. 57, 58–60 (1998).

167. ESKRIDGE ET AL., *supra* note 166, at 851–54.

168. *Id.*

169. *Id.*

for the courts to even apply the statute, let alone apply the rule of lenity.

All of the justifications for the rule of lenity counsel strongly in favor of slowing this aggressive expansion of criminal law. First, the extensive expansion of crimes certainly undermines the goal of fair notice. Fair notice is also implicated in the selective prosecution context, as the heart of a selective prosecution case is an allegation of disparate treatment by the prosecutor. While it could be argued that wrongdoers are not necessarily well read in the law and ignorance of the law is normally not an excuse anyway, the principle of notice remains essential. Furthermore, notice limits the discretion of prosecutors by disallowing unexpected and aggressive extensions of the law. Especially when so many crimes are inextricably linked with vague notions of unacceptable breaches of private policies,[170] notice is best served by the courts declining to extend the law to cover unexpected, uncertain factual scenarios even where the prosecutor has chosen to charge the crime.

Use of the rule of lenity would also help to lessen the risk of arbitrary or politically motivated prosecution. Both *stare decisis* and principles of separation of powers counsel that liberty and justice are best served by clarity and regularity; expanding criminality without legislative direction, or respect to precedent, undermine this foundational concept of American jurisprudence. Transparency and fair notice are best served when prosecutors choose only to prosecute when conduct is well-proscribed in the criminal code, and consistently prosecuted in the criminal courts. By restricting prosecutions to these discrete zones of conduct, the margin for malicious or inappropriately expansive prosecution shrinks.

While the humanitarian justification for lenity was initially conceived to avoid excessive capital punishment,[171] it seems equally appropriate as a ground for mitigating the harshness of a criminal sanction in areas where the law is being expanded. The deprivation of liberty for a period of years or decades is no light undertaking and should be avoided unless absolutely necessary. When the law is expanded, new conduct is criminalized. Defendants, while protected by the requirement of notice, lose the benefit of time-tested legal defenses to the new charge and the experience of years of predictability in what constitutes criminal conduct in that particular context. Yet they face the prospect of expensive legal defenses

170. *See supra* Part I.A.1 (discussing embezzlement).

171. ESKRIDGE ET AL., *supra* note 166, at 851–54.

and stigma as a result of being charged,[172] and if convicted they face a deprivation of liberty.

The expansion of law also implicates separation of powers concerns, as both the executive (prosecutor) and the judiciary should not create new criminal law. It is said that there exists a dialogue between the courts and the legislature.[173] For instance, legislators sometimes respond directly to judicial decisions they do not like by passing new laws to reverse judicial pronouncements;[174] alternatively, their silence in the face of an administrative or judicial interpretation can be construed as legislative acquiescence.[175] The same dialogue may occur between the executive and the legislature—if a statute omits penal sanctions for unforeseen or novel conduct, the prosecutor's inability to apply criminal sanctions may be met with legislative action.[176] On the other hand, if the prosecu-

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172. Consider the recent example of two nurses charged with "misuse of official information," a felony under Texas law, after they reported their doctor supervisor for allegedly unprofessional conduct. *See* Kevin Sack, *Texas Nurse Faces Trial and Possibly 10 Years in Prison for Reporting a Doctor*, N.Y. TIMES, Feb. 7, 2010, at A18. The case against another nurse was already dismissed at the prosecutor's discretion, but

> [t]he nurses, who are highly regarded even by the administrator who dismissed them, said the case had stained their reputations and drained their savings. With felony charges pending, neither has been able to find work. They said they could feel heads turn when they walked into local lunch spots like El Joey's Mexican restaurant.

Id. Clearly, this prosecution has had grievous effects on the nurses despite its likely lack of merit.

173. *See generally* ESKRIDGE ET AL., *supra* note 166, at 851–54.

174. Perhaps the most famous example of this is the legislature's response to *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), said to be the impetus for the formulation and eventual ratification of the 11th Amendment. *See* Hans v. Louisiana, 134 U.S. 1, 11 (1890) ("*Chisholm v. Georgia* . . . created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States."). Congress also directly responded to the Supreme Court's decision in *Stenberg v. Carhart*, 530 U.S. 914, 932 (2000), in the Partial Birth Abortion Act of 2003, 18 U.S.C. § 1531 (2006).

175. *See, e.g.*, Cable Ariz. Corp. v. CoxCom, Inc., 261 F.3d 871, 876 (9th Cir. 2001) (citing Bob Jones Univ. v. United States, 461 U.S. 574, 599 (1983) (congressional silence acquiesces in administrative interpretation) and Lewis v. United States, 663 F.2d 889, 891 (9th Cir. 1981) (congressional silence affirms judicial interpretation)).

176. For example, *Ratzlaf v. United States*, 510 U.S. 135 (1994), illustrates the dialogue between Congress, the prosecutor, and the courts discussed above. Congress enacted a criminal statute requiring "willfulness" for a violation of the Money Laundering Act, and the prosecutor initially interpreted the statute by charging Ratzlaf with a violation of the Money Laundering Act where there was no evidence that Ratzlaf knew that his actions were unlawful. The Court, noting the unclear language of the statute and citing the rule of lenity, interpreted the statute to essentially require specific intent—he had to know that the structuring in which he was engaged was unlawful. *Id.* at 146. Congress, evidently dissatisfied with this solution, amended the statute to remove the willfulness requirement for a violation of the structuring act. *See, e.g.*, United States v. MacPherson, 424 F.3d 183, 189 (2d Cir. 2005); United States v. Khalife, 106 F.3d 1300, 1302 n.3 (6th Cir. 1997). In this instance, separation

tor takes it upon herself to expand the application of the statute, then the legislature may not be prompted to act, and the law will progress in a haphazard, undemocratic fashion. Caught within this extensive expansion are potentially innocent people, and lurking in the shadows is the difficult to check danger of selective, politically motivated prosecution.

As to its application, I would further argue that the rule of lenity should be broadly construed to include not only a cautious language analysis of the criminal statute, but also recognition of how the statute has been traditionally applied. An inverse relationship ought to exist between notice and lenity. The less precedent there is for a class of prosecutions, the more lenity should be applied. Past practice like common law helps to define the language and its meaning in context. To apply old criminal law statutes to new problems excessively risks undermining the legislative intent and surprising rather than giving fair notice to the citizens. Indeed, how does one divine legislative intent in the context of an unforeseen development? This is not to argue that criminal law statutes cannot evolve like the common law to meet new environments and technology, but rather to argue that these applications should be conservatively applied to the statute's core mandate.

Currently many states,[177] with the support of some scholars,[178] completely reject the rule of lenity. The Model Penal Code declined to adopt the doctrine and instead dictates that criminal statutes be "construed according to the fair import of their terms."[179] Furthermore, the Model Penal Code mandated that "when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this Section and the special purposes of the particular provision involved."[180] Among the "general purposes" listed by the Model Penal Code are crime prevention, promotion of correction and rehabilitation, safeguards against arbitrary punishment, and fair

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of powers properly functioned, and potential future defendants have notice that the money laundering act does not require specific intent; that is, they can be prosecuted despite the fact they did not know they were violating the law. While this solution might have skirted Congress' intent in the first instance—it appears Congress actually did intend that people like Ratzlaf be punished despite the *Ratzlaf* decision—the Court strictly construed the criminal statute in accordance with the rule of lenity and required Congress to make itself clear before mandating punishment.

177. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 5.04 (5th ed. 2009).

178. *See, e.g.*, Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345.

179. MODEL PENAL CODE § 1.02(3) (1985).

180. *Id.*

warning.[181] The weakness in the Model Penal Code approach is that it essentially provides a discretionary balancing approach that gives courts little specific guidance and makes fair notice simply one of several factors. This matrix is really a mandate for case-by-case discretion and does not define the priorities of these often-contradictory goals. Rather, in essence, it rejects as necessarily prevailing the concerns addressed by the lenity doctrine, including ad hoc (and potentially more selective and biased) reformations and expansive interpretations of specific criminal law statutes. Indeed, in evaluating the sufficiency of evidence supporting a guilty verdict on appeal, a reviewing court is supposed to weigh the evidence most favorably to the government.[182] This essentially disfavors a defendant when found guilty in the context of a novel application of a statute. A reinvigoration of the rule of lenity would act as a check at the beginning of this cascading process to avoid an unjust result.

Unfortunately, even where recognized, the traditional lenity doctrine has been often narrowly construed and limited. In fact, current application of the rule follows two methods. The first—that "courts must decline to impose punishment for actions that are not 'plainly and unmistakably' proscribed"[183]—approaches the issue by asking how the criminal statute actually reads. This may be invoked in order to overturn a conviction where the statute did not clearly prohibit the conduct.[184] An alternative interpretation limits application of lenity to where there is "a 'grievous ambiguity or uncertainty' in the statute."[185] While not rejecting lenity as some courts and the Model Penal Code do, this approach, by definition, tolerates less than grievous ambiguity and fails to require that the court determine the statute's core mandate and plain and unmistakable proscription. Since it is not uncommon to find ambiguity in statutory language, it is understandable that many courts may be hesitant to open a perceived floodgate to demands of lenity except when faced with a nearly incomprehensible statutory mandate. The image of criminal defendants parsing statutory phrases to

181. *Id.* § 1.02(2).

182. *See, e.g.*, Peter F. Vaira & James A. Backstrom, *Criminal Appeals*, *in* 2 CRIMINAL DEFENSE TECHNIQUES 48–23 (Elizabeth A. Wolf ed., 2010) (citing United States v. DeLira-Villareal, 102 Fed. Appx. 406 (5th Cir. 2004), and United States v. Suggs, 374 F.3d 508 (7th Cir. 2004)).

183. Dunn v. United States, 442 U.S. 100, 112–13 (1979).

184. Ratzlaf v. United States, 510 U.S. 135, 148 (1994) (citing the rule of lenity and noting that "were we to find § 5322(a)'s 'willfulness' requirement ambiguous as applied to § 5324, we would resolve any doubt in favor of the defendant").

185. Staples v. United States, 511 U.S. 600, 619 n.7 (1994) (citing Chapman v. United States, 500 U.S. 453, 463 (1991)).

manufacture loopholes to escape punishment has undoubtedly fanned this increased hesitancy to tolerate a consideration of lenity. Yet there is a reason the lenity doctrine evolved, and ironically, in its decline, its mandate has never been more needed.

United States v. Thompson[186] represents a desirable and robust application of lenity, but it is not at all clear how many other courts would have applied it under similar facts. Defendant Georgia Thompson was a section chief of the Wisconsin Bureau of Procurement. Wisconsin selected Adelman Travel Group as its travel agent for forty percent of its annual $75 million travel budget. As the Seventh Circuit opinion by Chief Judge Easterbrook described it, "Thompson steered the contract to Adelman Travel, the low bidder, even though other members of the selection group rated its rivals more highly."[187] According to the appellate court, "[t]he prosecution's theory was that any politically motivated departure from state administrative rules is a federal crime, when either the mails or federal funds are involved."[188] The prosecution also argued that Thompson's $1000 raise in her annual salary was related to the contract since the principal owners of Adelman were political supporters of the Wisconsin governor. On appeal, Thompson did not dispute the latter contention, and the appellate court consequently assumed this link was established. Thompson was convicted under 18 U.S.C. § 666, which punishes a state agent who both works for any entity receiving more than $10,000 from the federal government and "embezzles, steals, obtains by fraud or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies property"[189] valued at more than $5000 and under the custody or control of the agency. Thompson's conviction received intense publicity within the state, and she became a poster child of government corruption for the opposing political party.[190] The appellate court acknowledged that "misapplies" could be read broadly to mean "any disbursement that would not have occurred had all state laws been enforced without any political considerations."[191] Alternatively, the opinion noted it could be construed "narrowly, so that it means a disbursement in exchange for services not rendered (as with ghost workers), or to suppliers that would not have received any contract

186. 484 F.3d 877 (7th Cir. 2007).

187. *Id.* at 878.

188. *Id.*

189. *Id.* at 880 (citing 18 U.S.C. § 666 (2006)).

190. Bill Leuders, *Biskupic Tried to 'Squeeze' Georgia Thompson*, THE DAILY PAGE (May 17, 2007), http://www.thedailypage.com/isthmus/article.php?article=7081.

191. *Thompson*, 484 F.3d at 881.

but for bribes, or for services that were overpriced . . . or for shoddy goods at the price prevailing for high quality goods"—none of which the court found satisfied in this case.[192] Utilizing the principle of lenity, the court adopted the narrow construction and reversed the conviction after ordering Thompson's immediate release from prison following oral argument. The court reasoned:

> A violation of regulations and perhaps of some statutes has occurred, but is the error a crime? As we read § 666, the answer is no unless the public employee is on the take or the applicant is a relative (for indirect benefits are another form of payoff). An error—even a deliberate one, in which the employee winks at the rules in order to help out someone he believes deserving but barely over the eligibility threshold—is a civil rather than a criminal transgression. Likewise the sin is civil (if it is any wrong at all) when a public employee manipulates the rules, as Thompson did, to save the state money or favor a home-state producer that supports elected officials.[193]

The court, again invoking lenity, reversed Thompson's conviction under 18 U.S.C. § 1341, which prohibits "any scheme or artifice to defraud" employing United States mail and, in this instance, depriving Wisconsin of her "honest services."[194] Concerned that the prosecutorial approach would convert violation of state rules into federal crimes, the court noted it had construed the language of the statute to mean "misuse of office" for "private gain."[195] The court noted that "it would stretch the ordinary understanding of language, however, to call a public employee's regular compensation, approved through above-board channels, a kind of 'private gain.'"[196] Instead, the court noted that "the Rule of Lenity counsels us not to read criminal statutes for everything they can be worth. The history of honest services prosecutions is one in which the 'private gain' comes from third parties who suborn the employee with side payments, often derived via kickbacks skimmed from a public contract."[197]

While in no way explicit, the *Thompson* decision is suggestive of a more expansive role for lenity doctrine. I would urge a third approach in which the lenity doctrine mandates courts to discern the

192. *Id.*
193. *Id.*
194. *Id.* at 882 (citing 18 U.S.C. § 1341 (2006)).
195. *Id.* at 883.
196. *Id.* at 884.
197. *Id.*

core contour and boundaries of a criminal law statute as defined by (1) language; (2) legislative purpose; and (3) past precedents and applications of the statute. The lenity doctrine should not be viewed as an obsolete historical anachronism nor restricted to grievously ambiguous language, but should instead allow courts to engage the other two branches of government to better insure that a prosecution is with notice, fairly applied, and consistent with legislative intent. As noted above, lenity has traditionally involved an interpretive dialogue where legislatures can correct judicial constructions that narrow the breadth of the criminal law more than they desired.[198] Yet just as *Thompson* reviewed past prosecutorial applications and also focused on insuring a sensible line between criminal and non-criminal transgressions, this third approach reviews the executive branch's prosecutorial discretion to insure against isolated, aberrational extensions in criminalization beyond mere linguistic interpretation. Ultimately, the legislature can overrule the court's lenity with new clarifying legislations thereby providing notice and consistency, but in the interim, there is more protection from misapplication of prosecutorial discretion, which otherwise has little to limit it.

Such a rule of lenity represents a balanced approach to prevent the overly aggressive expansion of criminal law into commonly acceptable conduct and acts as an important check to prevent convictions when prosecutor's application of a statute goes too far. It may also reduce the risk of selective prosecution in the context of campaign donations.

2. Incorporation of the English Doctrine of Dishonesty

Another doctrine that protects individuals from overzealous application of the criminal law is the English doctrine of dishonesty. If either legislatures in the United States or the drafters of the Model Penal Code incorporated a dishonesty requirement in any of the crimes discussed above, some of the problems associated with the expansion of criminal law into commonly acceptable conduct would be alleviated. Thus, this Article does not suggest that courts interpret otherwise unambiguous statutes as requiring a finding of dishonesty, but rather suggests that both Congress and state legislatures may choose to confront the problems of expanding criminality and selective prosecution by following the example of such an influential common law jurisdiction.

198. *See supra* note 176 and accompanying text.

Under English law, the dishonesty requirement goes well beyond claim of right as a defense since it actually adds to the mens rea requirement in theft crimes.[199] Thus, one cannot be convicted of theft unless the court finds the defendant was dishonest.[200] Dishonesty is not specifically defined in the English Theft Act of 1968, but section 2(1) of the Act provides nonexhaustive examples of what is *not* dishonest.[201] The first example is the English analogue of the United States claim of right defense: "where D believes that he has the legal right to deprive V of it."[202] The second example is where "D believes that V would have consented if V had known of the circumstances."[203] The third occurs "where D believes that the owner of the property cannot be discovered by taking reasonable steps."[204] Dishonesty is a question for the jury,[205] and courts have developed an approach to ascertain whether dishonesty is present in cases not governed by the section 2(1) exclusions:

> In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury [or magistrates] must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. If it was dishonest by those standards, then the jury [or magistrates] must consider

199. ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 336 (1991). This Article is mainly concerned with dishonesty as an essential element of theft crimes. The English Theft Acts of 1968 and 1978, as well as the Theft (Amendment) of 1996, require dishonesty as an essential element of theft crimes. *See, e.g.*, Theft Act, 1968, c. 60, § 1 (Eng.); Theft Act, 1978, c. 31, § 1 (Eng.); Theft (Amendment) Act, 1996, c. 62, § 1 (Eng.). The Fraud Act 2006 also requires dishonesty as an element of fraud. *See* Fraud Act, 2006, c. 35, § 2(1) (Eng.). Although outside the scope of this paper, the requirement of honest belief also arises in the context of defenses to crimes. This is yet another example of English law refusing to convict people who were acting honestly. For discussion of this aspect of English law, see Kyron Huigens, *The Continuity of Justification Defenses*, 2009 U. ILL. L. REV. 627, 647 (2009) (discussing honest belief defenses in English law); Kenneth W. Simons, *Self-Defense: Reasonable Beliefs or Reasonable Self-Control?*, 11 NEW CRIM. L. REV. 51, 52 n.2 (2008) ("English law does not require a 'reasonable' belief in the relevant facts in order to grant a full defense; an honest belief suffices.").

200. *See* Theft Act, 1968, c. 60, § 2(1) (Eng.).

201. ASHWORTH, *supra* note 199.

202. *Id.*; *see* Theft Act, 1968, c. 60, § 2(1)(a) (Eng.); RICHARD CARD, CRIMINAL LAW 322 (15th ed. 2001) ("Section 2(1)(a) makes a claim of right (ie [sic] a belief in a legal right to deprive) a defense to theft, which means that a mistake of law may excuse . . . .").

203. ASHWORTH, *supra* note 199; *see* Theft Act, 1968, c. 60, § 2(1)(b) (Eng.).

204. ASHWORTH, *supra* note 199; *see* Theft Act, 1968, c. 60, § 2(1)(C) (Eng.).

205. CARD, *supra* note 202, at 323.

> whether the defendant himself must have realized that what he was doing was by those standards dishonest.[206]

This flexible, two-stage process helps to ensure that both the voice of the community and the individual defendant are heard in the determination of dishonesty. Importantly, one's honest belief—whether or not it accords with the beliefs of the community, and no matter how unreasonable[207]—can ensure that one is not convicted. Of course, the reasonableness of the belief may be relevant to its genuineness,[208] thus helping to prevent defendants from flouting legislative intent by falsely claiming honest beliefs.

The dishonesty element may help deter prosecutors from expanding the law to situations not normally covered by the law, thus serving the same purposes of the rule of lenity as an interpretative canon. Dishonesty is not always easily found, and requiring dishonesty may deter prosecutors in cases where proof is lacking or where the law has not traditionally criminalized that conduct. Consider Professor Ashworth's description: "Dishonesty may be easily recognized in some situations, but it is far more difficult in situations with which a jury or magistrate are unfamiliar—such as alleged business fraud or financial misdealing. Moreover, much depends on who is responsible for characterizing conduct as dishonest."[209]

Part I.A. of this Article particularly focused on embezzlement and false pretenses, theft crimes in the United States, showing how expansively they may be applied. Incorporating a dishonesty requirement into theft crimes in the United States, as the English have done, may help avoid the problems resulting from this overexpansion. For instance, in *Talbot*, the defendants arguably did not know that their acts were illegal and argued that they were widely accepted in the company.[210] Applying the English dishonesty requirement, this belief, if true, could prevent conviction. Further, under the two-part test, if the behavior (like in *Talbot*) is something that is commonly done in business, it is possible that the

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206. R. v. Ghosh, [1982] 1 Q.B. 1053 [1064] (Eng.).

207. *See* MICHAEL JEFFERSON, CRIMINAL LAW 414 (5th ed. 2001) ("The accused does not, for instance, need to have reasonable grounds for his belief that the owner would have consented, had he known of the circumstances."); JC SMITH & BRIAN HOGAN, CRIMINAL LAW (6th ed. 1988).

208. CARD, *supra* note 202, at 322.

209. ASHWORTH, *supra* note 199, at 338.

210. People v. Talbot, 28 P.2d 1057, 1057 (Cal. 1934) ("Certain evidence tended to show that defendants were not conscious that their acts amounted to embezzlement even if they did constitute bad business practice.").

jury, applying the community standards approach, would not find it dishonest at all, thus also avoiding a conviction.[211]

Additionally, if a dishonesty requirement were incorporated into theft laws in the United States, the lack of dishonesty would prevent false pretenses convictions of businesspeople for choosing to breach a contract in situations where it is more cost-effective to pay damages: this commonly accepted business strategy is something that, at minimum, the businessperson could establish as a legal right under contract law. As the dishonesty requirement also encompasses claim of right defenses,[212] cases where somebody with a good faith claim to property threatens to disclose the debt in order to obtain payment would also be exonerated from extortion charges if the dishonesty requirement applied to a crime like extortion.[213] It is hard to argue one acted dishonestly when one merely sought to recover what was one's due, as was at least arguably the case in *Beggs* and *Squillante.* Because the dishonesty requirement ensures that ordinarily acceptable conduct is not swallowed up by the criminal law, both legislatures and drafters of the Model Penal Code may consider incorporating such a requirement into our criminal law.

Finally, it is important to remember it is not necessary to adopt the English dishonesty requirement wholesale. Rather, we can learn from the English experience and craft a rule that is responsive to the criticisms leveled against the English rule. While the English dishonesty requirement may be praised for its ability to include the ordinary sensibilities of the people in its dishonesty determination, it has been criticized for not providing predictive guidance to potential criminals—what is dishonest is truly a case-by-case inquiry, dependent on the jury, the defendant, the location, and the crime.[214] A dishonesty requirement in the United States could take the form of a specific definition, enacted by legislators

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211. *See* CARD, *supra* note 202, at 324–25 (quoting R. v. Ghosh, [1982] 1 Q.B. 1053 (Eng.)).

212. *See* ASHWORTH, *supra* note 199, at 336.

213. The crime of blackmail in English law requires an "unwarranted demand." *See* JEFFERSON, *supra* note 207, at 414 ("In blackmail the equivalent of dishonesty is an unwarranted demand."). The same "honest belief" standard applies to blackmail crimes under English law. *Id.* at 416 ("With regard to blackmail the Criminal Law Revision Committee did not want a test that the accused's belief had to be reasonable because such could be out of line with the rest of the 1968 Act.").

214. ASHWORTH, *supra* note 199, at 338; CARD, *supra* note 202, at 325 ("The approach laid down in *Ghosh* is liable to create an additional ground for contested trials, to complicate the judge's direction, and to lead to arbitrary and inconsistent verdicts by different juries or benches of magistrates as to what is dishonest."). Additionally, Professor Card argues that the dishonesty requirement as currently constituted may violate the European Convention on Human Rights because of the lack of standards. *Id.* at 325.

and to be interpreted by the courts, as opposed to a potentially vague jury question with uncertain standards, thus providing more guidance and alleviating the concerns that the English rule has generated.

Adding a dishonesty requirement is not a panacea, but it can work to prevent overcriminalization of ordinarily acceptable conduct.

3. Ensuring Proper Application of Criminal Law

My suggested solutions to the problems outlined above, stricter application of the rule of lenity and a potential incorporation of the English dishonesty requirement, are not mutually exclusive. While either of the doctrines in isolation can help to address the problems outlined in Part I, the two doctrines can work in conjunction. For instance, greater lenity may lead legislatures to enact clearer laws instead of prosecutors haphazardly expanding criminal law to cover new situations. These new enactments will provide the notice that the rule of lenity strives to protect. Once potential criminals have notice, what were once honest beliefs of lawfulness will be negated by an increased clarity and knowledge of the law. Clear legislative pronouncements, as opposed to haphazard expansions by prosecutors and courts, will help to ensure consistent and fair prosecutions.

Even if a legislature chooses to enact a crime requiring dishonesty as an element, lenity is still important. The courts must ensure that, if the statute is ambiguous, the criminal sanction is applied only to conduct that was plainly intended to be within the reach of the statute. Thus, in defining dishonesty for the jury and in reviewing convictions of crimes where dishonesty was an element, judges must still apply the rule of lenity to ensure that ordinarily acceptable conduct does not become confused with dishonest conduct through excessively aggressive application of the criminal law.

Perhaps most importantly, these doctrines will help avoid the two main problems regarding the expansion of criminal law: its vague boundaries that spill over into ordinarily acceptable conduct and its potential for politicization. A reinvigoration of the rule of lenity would provide greater notice to defendants and motivate legislatures to improve clarity in the law. An honest belief in legality, on the other hand, could protect those prosecuted for traversing the vague boundaries of acceptable conduct if the legislatures choose to incorporate the dishonesty requirement. Both of the doctrines may be employed to minimize the risk of politicized

prosecution and provide important checks where appropriate prosecutorial discretion may be lacking.

CONCLUSION

As shown above, criminal law is filled with ambiguities. Statutes are imperfectly drafted, and in many cases, criminal law is defined based on vague, privately defined notions of unacceptable conduct. As such, criminal law starts to cover behavior commonly considered acceptable. There is also a great danger of politicization and bias in criminal law prosecution.

These dangers are too great not to attempt to limit or define the criminal law's application in a principled way. The rule of lenity and the dishonesty requirement offer a broad approach to ensure that criminal law does not evolve into either an arbitrary political tool or a set of random extensions of illegality with little notice to the accused and little input from the legislature. Prosecutorial discretion may accomplish these goals without resort to the rule of lenity or dishonesty requirement; but when prosecutorial discretion fails, the courts should aggressively utilize these principles to insure a neutral, principled use of criminal law.